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No. 97-243

In The

Supreme Court of the United States

October Term, 1996

DAVID M. MUMFORD,

Petitioner,

vs.

DAVID A. BASINSKI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE DAVID A. BASINSKI

RICHARD O. WUERTH
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
(614) 228-6885

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio
M. ROBERT FLANAGAN*
Assistant County Prosecutor
Lorain County, Ohio
226 Middle Avenue
Third Floor
Elyria, Ohio 44035
(440) 329-5398

Attorneys for Respondent Judge David A. Basinski

* *Counsel of Record*

71950 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment prohibit the patronage dismissal of a domestic relations court referee employed by a state common pleas court?

2. Does the Eleventh Amendment bar an official capacity claim against a state common pleas court judge which seeks redress under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Petitioner, David M. Mumford, hereinafter "Mumford", filed suit pursuant to 42 U.S.C. § 1983 against the Honorable Joseph C. Zieba, in his individual and official capacities, and the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division following Judge Zieba's termination of Mumford's employment as a domestic relations court referee.

The claims against the Domestic Relations Court were dismissed because the Domestic Relations Court was not a "person" for purposes of § 1983. *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993). The individual capacity claim against Judge Zieba was dismissed on the basis of qualified immunity. *Id.*

After the official capacity claim was remanded for trial, Judge Zieba retired; and the Honorable David A. Basinski was substituted as the new party defendant pursuant to Rule 25 of the Federal Rules of Civil Procedure.

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APPENDIX

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OPINIONS BELOW

Mumford is requesting this Court to review the decision of *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), which held that the position of domestic relations court referee was not, as a matter of law, accorded First Amendment protection against a patronage dismissal; and that for purposes of § 1983, the Eleventh Amendment barred an official capacity claim against a state court judge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the application of the First, Eleventh and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Between January 22, 1979 and January 2, 1989, Mumford was a referee employed by the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division, hereinafter "Domestic Relations Court", in Elyria, Ohio. During this time period, Mumford, a registered democrat, was appointed to this position by the Honorable Henry T. Webber, a registered democrat.

In the Fall of 1988, then Candidate Zieba, a registered republican, ran for Judge Webber's Domestic Relations Court judgeship because, in Candidate Zieba's opinion, the Domestic Relations Court was not serving the public interest. Judge Henry T. Webber, and his father, Judge Henry P. Webber, a registered democrat, had controlled the Domestic Relations Court from its inception in the 1950's. Candidate Zieba felt it was time for a change in court administration and philosophy through new

leadership and direction. To this end, Candidate Zieba, during his campaign, *inter alia*, promised the electorate that he would "clean house" if elected. Upon being elected, Judge-Elect Zieba kept his campaign promise and cleaned house.[1]

By correspondence dated December 23, 1988, Judge-Elect Zieba advised Mumford that he would not be employed by the Domestic Relations Court after January 2, 1989, the date on which Judge-Elect Zieba's six (6) year if office term commenced.[2]

As was established by Judge Zieba, political considerations were not the substantial or motivating factors in the decision to terminate Mumford's employment. Judge Zieba was primarily concerned about Mumford's lack of competence, diligence and suitability to perform the job of a domestic relations court referee. Given these concerns, Judge Zieba preferred to appoint key employees of his own selection rather than maintain the status quo with a key employee that had been appointed by Judge Webber, which employee's job performance and ability was extremely suspect and very questionable. When the totality of the circumstances were considered, Judge Zieba was not comfortable with retaining Mumford's services and felt that it would be in the Domestic Relations Court's best interests to terminate Mumford's employment.

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1. Mumford was the only Webber loyalist who contested the constitutionality of his dismissal.

2. Under Ohio law, Mumford was an unclassified civil servant who served at the pleasure of the administrative judge. (Ohio Revised Code §§ 124.11 and 2151.13; and Ohio Attorney General Opinion Number 76-031). In other words, Mumford was an employee-at-will; and did not have any protected property interest in continued employment as a domestic relations court referee.

In retrospect, Judge Zieba's grave concerns proved to be well-founded. During discovery, Mumford produced his income tax returns and correspondence he mailed to some six hundred (600) prospective employers. The documents produced by Mumford revealed that Mumford never practiced law following his 1989 termination; and that Mumford did not obtain comparable employment. Needless to say, Mumford's employment history following his 1989 termination leaves much to be desired, and begs the question about Mumford's suitability and fitness for employment in the first instance. As of this writing, Mumford is still voluntarily unemployed.

On December 17, 1990, Mumford filed a civil rights lawsuit against Judge Zieba and the Domestic Relations Court alleging, *inter alia*, that Judge Zieba's termination of Mumford's employment as a domestic relations court referee violated his First Amendment constitutional rights because Mumford supported Judge Zieba's political opponent, the incumbent Judge Henry T. Webber, in the 1988 general election for one (1) of the two (2) Domestic Relations Court judgeships. Judge Zieba was sued in both his official capacity and in his individual capacity.[3] Both Judge Zieba and the Domestic Relations Court denied violating Mumford's civil rights.

Judge Zieba moved to dismiss the individual capacity suit on the basis of qualified immunity. The district court denied Judge Zieba's motion for summary judgment [*Mumford v. Zieba*, 788 F. Supp. 987 (N.D. Ohio 1992)]; and a qualified immunity appeal followed.

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3. It is important to note that Mumford did not sue Lorain County, Ohio, the Board of Commissioners of Lorain County, Ohio or Judge Basinski, the other Domestic Relations Court Judge who was also elected in November of 1988.

On appeal, in *Mumford I*, the Sixth Circuit ruled that Judge Zieba was qualifiedly immune from suit with respect to the individual capacity claim; and that the Domestic Relations Court was not a "person" for purposes of 1983. *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993). Without specifically addressing the issue of whether or not a referee enjoyed First Amendment protection against a patronage dismissal, the court remanded Mumford's official capacity claim for trial. (*Id.*)

Thereafter, in 1994, Judge Basinski was substituted as the new party defendant following Judge Zieba's mandatory age-related retirement. While cross-motions for summary judgment were pending, Judge Basinski moved the district court to dismiss Mumford's official capacity claim because the change in administrations mooted Mumford's Complaint. Relying upon the authority of *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S. Ct. 1323 (1974), the district court dismissed the remaining official capacity claim on the basis of mootness. *Mumford v. Zieba*, 915 F. Supp. 917 (N.D. Ohio 1995).[4] Mumford appealed the mootness dismissal of the official capacity claim.

In *Mumford II*, the Sixth Circuit, while disagreeing with the district court's mootness analysis, nonetheless affirmed the dismissal of Mumford's Complaint because the First Amendment does not prohibit a patronage dismissal of a domestic relations court referee; and because the Eleventh Amendment prohibits an official capacity § 1983 claim against a state common pleas court judge because a state common pleas court judge is a "state" actor for § 1983 liability and Eleventh Amendment immunity analyses. *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997).

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4. The district court did not rule upon the cross-motions for summary judgment before it dismissed Mumford's Complaint.

A week after oral arguments in *Mumford II*, Mumford filed another patronage dismissal lawsuit against Judge Basinski. In the case of *David M. Mumford v. David A. Basinski, et al.*, United States District Court, Northern District of Ohio, Eastern Division, Case Number 1:96CV2182, Mumford alleged that Judge Basinski violated Mumford's First Amendment rights in 1994 when Judge Basinski did not re-hire Mumford as a Domestic Relations Court IV-D Referee. Mumford's second attempt to obtain court-ordered employment with the Domestic Relations Court failed because Mumford did not sue Judge Basinski within the applicable statute of limitations, because referees are not within the ambit of the First Amendment's protection against patronage dismissal and because Eleventh Amendment immunity precludes a § 1983 claim against a state court judge. (July 31, 1997 Memorandum of Opinion, *Mumford v. Basinski*, United States District Court, Northern District of Ohio, Eastern Division, Case Number 1:96CV2182, Appendix, pp. 1a–5a).

As set forth below, the Sixth Circuit, consistent with applicable Supreme Court precedent, properly determined that the position of referee was not protected from a patronage dismissal; and that a state court judge was a state actor, who, in his official capacity, was not amendable to suit under 42 U.S.C. § 1983. The case of *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997) does not present any questions of national importance; and does not conflict with any other circuit court decision involving the same or similar issue so as to warrant any further review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE FIRST AMENDMENT DOES NOT PROHIBIT THE PATRONAGE DISMISSAL OF A DOMESTIC RELATIONS COURT REFEREE.

A fortia, Mumford argues that the Sixth Circuit erroneously reached the First Amendment issue because he only appealed the district court's mootness dismissal. (Petition for Writ of Certiorari, pp. 4, 5, 6). On appeal, a party is permitted to advance any argument in support of the district court's judgment even though the advanced argument did not form the basis of the lower court's decision. *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970); *Arlinghaus v. Ritenour*, 622 F.2d 629 (2d Cir. 1980); *United States v. General Motors Corporation*, 518 F.2d 420 (D.C. Cir. 1975); and *Boykin v. District of Columbia*, 689 F.2d 1092 (D.C. Cir. 1982). The unprotected nature of Mumford's position was specifically raised in the district court; thus, the First Amendment issue was properly considered by the Sixth Circuit even though Mumford specifically requested the Sixth Circuit to limit the scope of *Mumford II* to the district court's mootness ruling. The Sixth Circuit's refusal to limit the scope of *Mumford II* was not an abuse of discretion; and is not a basis for granting Mumford's Petition for [a] Writ of Certiorari.

In his Complaint, Mumford alleged that he was unconstitutionally terminated for political reasons. While this allegation has been vehemently denied and disputed below, solely for purposes of the within proceeding for a writ of certiorari, Mumford's allegation will not be disputed.[5]

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5. The failure to dispute this allegation, solely for purposes of this proceeding, is not to be construed as an admission of same.

While there is a general ban on patronage dismissals of public employees, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729 (1990), this prohibition does not extend to key, confidential, policy-making positions, *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), or to positions where party affiliation is an appropriate job requirement. *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). Although this Court's decisions in *Elrod* and *Branti* protect rank and file government employees from adverse personnel action based on patronage considerations, federal courts have recognized a substantial number of exceptions to this rule because political considerations, either in the sense of political affiliation or personal loyalty, are appropriate for the performance of the job in question. *See, e.g., Rice v. Ohio Dept. of Transp.*, 14 F.3d 1163, 1141, n. 7 (6th Cir. 1994).

The *Rice* court, after reviewing the development of case law under the *Elrod/Branti* exception that permits the consideration of patronage with respect to politically sensitive and confidential positions, determined that political considerations were "appropriate" in the decision to employ an administrative assistant. *Rice v. Ohio Dept. of Transp.*, 14 F.3d 1163, 1143 (6th Cir. 1994). Referring to its decision in *Faughender v. City of North Olmsted, Ohio*, [927 F.2d 909 (6th Cir. 1991)], the *Rice* court stated:

> . . . the test is not whether party affiliation and support are essential to the effective performance of the public office involved; the test, under *Branti*, is whether these are "appropriate" requirements. The outer limits of what is appropriate are now subject to determination by the courts, but within those limits, surely, the judgment of the people's elected representatives merits

> respect. This is the lesson of *Faughender*, where we held that the mayor was entitled to decide for herself whether to give her secretary political responsibilities that would justify appointment on a political basis.

Rice v. Ohio Dept. of Transp., 14 F.3d 1133, at 1142 (6th Cir. 1994).[6]

The *Branti* "party affiliation" standard is met when there is a relationship of "confidence and trust" between employer and employee. *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990). Moreover, when a newly elected official makes personnel changes, the judgment of the people's elected representative, *i.e.*, Judge Zieba, merits respect by a reviewing court. *Rice v. Ohio Dept. of Transp.*, *supra*.

There are only four (4) reported cases that have addressed the issue of whether or not a referee can be terminated for purely political reasons. Each of theses cases are adverse to Mumford, as is the unreported case of *Mumford v. Basinski,* Case Number 1:96CV2182, Appendix, pp. 1a-5a. In *Garretto v. Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981), the court determined that a workers' compensation referee **could be terminated** for political reasons because the referee was a policy-maker. Similarly, in *Hawkins v. Steingut*, 829 F.2d 317 (2d Cir. 1987), the court ruled, as a matter of law, that a state court referee **did not have a clearly established constitutional right** not to be terminated for political reasons. The Sixth Circuit, in *Mumford I*, clearly suggested that the First Amendment did not protect a referee from a patronage dismissal. *Mumford v. Zieba*, 4 F.3d 429, 435

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6. *Cf.*, *Blair v. Meade*, 76 F.3d 97, 101 (6th Cir. 1996), wherein the court cautioned against allowing "... a prior judge executive to define for his successors how the office is run. Such a rule would hamper the new administration's ability to implement its policies".

(6th Cir. 1993). When the patronage issue was directly addressed in *Mumford II*, the Sixth Circuit stated:

> [i]n *Mumford v. Zieba*, 4 F.3d 429, 433 (6th Cir., 1993), [the] court . . . clearly *implied* that a court referee, of necessity, had a confidential relationship with the judge whom he served, which transformed political affiliation into an appropriate employment consideration.

Mumford v. Basinski, 105 F.3d 264, 271 (6th Cir. 1997). (Emphasis in original). After analyzing the inherent positions and duties of a domestic relations court referee, the Sixth Circuit concluded that:

> . . . Mumford's former position as referee for the Domestic Relations Court was an inherently political post which was not safeguarded from political patronage termination by the First Amendment, and therefore, [Mumford's] official capacity claim under section 1983 must by rejected.

Mumford v. Basinski, 105 F.3d 264, 273 (6th Cir. 1997).

Mumford's reliance on *Roldan-Plumey v. Cerezo-Saurez*, 115 F.3d 58 (1st Cir. 1997), so as to create a circuit court conflict, is misguided. (Petition for Writ of Certiorari, pp. 9, 23). The "hearing examiner" in *Roldan-Plumey* was only charged with the responsibility of uncovering, investigating and reporting municipal wrong-doing to the city's mayor such that the mayor would be in a position to take appropriate disciplinary action, if warranted. This "hearing examiner" position is more akin to a police department internal affairs investigator than it is to the

position of a domestic relations court referee. In contrast, a domestic relations court referee, the judge's alter ego, is entrusted with much greater responsibility, autonomy and discretionary authority. A referee presides over contested and adversarial judicial proceedings. Domestic relations court referees initially determine which parent has temporary custody of a child and establishes visitation rights for the non-custodial parent. There is a very significant difference between a "hearing examiner" who determines, for example, that a municipal employee has abused sick time, and a domestic relations court referee who determines what is in the best interests of a child as regards custody and visitation. Likening the *Roldan-Plumey* hearing examiner to a domestic relations court referee is an improper comparison of apples and oranges. Even the court noted that the hearing examiner's position was of a "quasi-adjudicative nature that did not even require the officer holder to possess a law degree", let alone be admitted to the practice of law. *Roldan-Plumey v. Cerezo-Saurez*, 115 F.3d 58, 64 (1st Cir. 1997).

The only other conflicting circuit decision relied upon by Mumford, *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985), is inapposite as well. (Petition for Writ of Certiorari, pp. 9, 21). In *Meeks*, the First Circuit determined that a judge's **bailiff** was not a confidential employee. The instant case involves the position of a domestic relations court **referee**.

In *Mumford II*, the Sixth Circuit examined, as a matter of law, the inherent duties of a domestic relations court referee [much like this Court did in *Branti v. Finkel*, 445 U.S. 507, 518, 519, 100 S. Ct. 1287, 1295 (1980) when it was determined, as a matter of law, that political affiliation was not an appropriate requirement in the continued employed of an assistant county public defender]; and concluded that political considerations were appropriate considerations in the employment of a referee

given the personal confidential relationship, *inter alia*, between a referee and the judge(s) which he serves. *Mumford II* at pp. 271, 272.

Citing *O'Hare Truck Service, Inc. v. City of Northlake*, __ U.S. __, 116 S. Ct. 2353 (1996), Mumford misleads this Court when he argues that an analysis of whether or not political considerations are appropriate is a "fact based application". (Petition for Writ of Certiorari, pp. 19, 20). Rather than a fact based application, this Court consistently focuses upon the nature of the position or the public office involved, as opposed to duties that were actually performed by the plaintiff or his successors. *Branti*, 445 U.S. at 518, 100 S. Ct. at 1295.[7] The majority opinions in *Elrod*, *Branti* and *Rutan* do not mandate a fact based application or determination.

As noted *supra*, this Court in *Branti* determined, as a matter of law, that public defenders were protected from patronage dismissals. In *O'Hare*, this Court, as a matter of law, extended First Amendment protection to municipal vendors (tow truck operators). In short, the analysis employed by the Sixth Circuit, including its consideration of the categories outlined in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), complied with this Court's pronouncements in *Elrod*, *Branti*, *Rutan* and *O'Hare*.

The present case involves the judicial branch. The sphere of activities is the administration of justice — the operation of a domestic relations court and juvenile court in an urban county. In the universe of the Domestic Relations Court, referees are high level employees. Compensation rates alone reflect the levels of qualification, responsibility and status among the many Domestic Relations Court positions. Excluding Judge Webber,

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7. *Cf.*, *Faughender v. City of North Olmsted*, 927 F.2d 909 at 912, 913 (6th Cir. 1991), and cases cited therein.

Mumford, as the Chief Referee, was the third most highly compensated court employee prior to his termination.

During 1989, the Domestic Relations Court had jurisdiction over 5,083 domestic relations cases, finalizing 3,847. During the same year, 6,811 juvenile cases were filed. The Domestic Relations Court conducted 14,872 hearings on juvenile matters. The Domestic Relations Court also disbursed approximately Twenty Five Million Dollars ($ 25,000,000) of child/spousal support payments in approximately 20,000 cases. Two elected judges could not possibly handle this caseload without the assistance of competent, loyal and trustworthy referees.

Within the hierarchy of the Domestic Relations Court, with its staff of 190 individuals, the referees, particularly Chief Referee Mumford, were key personnel in the operation of the Domestic Relations Court. Referees exercised substantial authority and independence while discharging the duties of the Domestic Relations Court, both in terms of handling the overall case load and the adjudication of specific disputes. Although the Judges of the Domestic Relations Court are the primary policymakers, the referees are communicators who are in a position to control the flow of information to the judges; who are in a position to have meaningful input on policy issues; and who, through their independent actions (scheduling, conducting hearings and deciding disputed issues), are responsible for interpreting and implementing policies. To an elected judge of the Domestic Relations Court, and to the public, referees occupied a key position in the administration of justice. Referees dealt face to face with the voting public. Their performance was politically sensitive.

Since referees were employees-at-will serving at the pleasure of the administrative judge, it was entirely appropriate for Judge Zieba to fill a referee position with an individual whom

he had confidence in and whom he trusted. Given the importance and the sensitivity of the position of domestic relations court referee, it was appropriate for Judge Zieba to consider Mumford's loyalties, as well as his professional competence or lack thereof, in making a decision whether or not to reappoint Mumford. The Sixth Circuit properly determined that political considerations are relevant in the decision to employ a domestic relations court referee.

Finally, Mumford's undying allegiance to Judge Krenzler's opinion in *Mumford v. Zieba*, 788 F. Supp. 987 (N.D. Ohio 1992), *rev'd*, 4 F.3d 429 (6th Cir. 1993), is foolish. (Petition for Writ of Certiorari, pp. 3, 4). Judge Krenzler's erroneous legal rulings were reversed and remedied by the Sixth Circuit in *Mumford I* and *Mumford II*; and are of no further precedental value.

In conclusion, the Sixth Circuit properly decided the First Amendment issue in accordance with existing Supreme Court precedent. There are no conflicting circuit court opinions which justify the grant of a writ of certiorari. The ruling below should not be disturbed.

II.

THE ELEVENTH AMENDMENT BARS A § 1983 CLAIM AGAINST A STATE COMMON PLEAS COURT JUDGE.

The Eleventh Amendment prohibits a federal court from entertaining a suit brought against a state unless a state has waived its sovereign immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 100, 104 S. Ct. 900 (1984). This explicit limitation is so compelling that an Eleventh Amendment sovereign immunity defense can be raised, even for the first time, before this Court. *Pennhurst*, *supra*; and *Ford Motor Co.*

v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347. As this Court noted:

> [a] federal court must examine each claim in a case to see if the court's jurisdiction is barred by the Eleventh Amendment.

Pennhurst, 465 U.S. at 121, 104 S. Ct. at 919.

Courts may *sua sponte* consider the applicability of Eleventh Amendment immunity. *See, e.g., Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037, 106 S. Ct. 605 (1985).

The issue of whether or not a particular defendant is a state actor or a local actor is dependent upon an analysis of state law; and this Court defers considerably to a circuit court's expertise in interpreting state law. *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702 (1989). Identifying a particular defendant as a state or a local actor is a question of law that is not a "suitable matter for the jury to decide". *Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989).

Before determining that a state common pleas court judge was a "state" actor shielded by Eleventh Amendment immunity, the Sixth Circuit thoroughly analyzed Ohio's applicable statutory and constitutional provisions relating to the creation of the system of common pleas courts, supervisory authority over Ohio courts, the election of judges, jurisdictional concerns, a judge's independent hiring authority and his or her ability to mandamus appropriate funding for court operations. *Mumford II*, at 268, 269, 270. After examining Ohio law, the Sixth Circuit properly determined that:

> . . . an Ohio common pleas court is *not* a segment of county government, but an arm of the state for purposes of section 1983 liability and Eleventh Amendment immunity analyses. Therefore, the instant claim against Basinski in his official capacity as the successor in office to Zieba as Administrative Judge of the Domestic Relations Court cannot stand.

Mumford v. Basinski, 105 F.3d 264 at 269, 270 (6th Cir. 1997). (Emphasis in original). (Footnote omitted).

Ohio law, as expertly interpreted by the Sixth Circuit, is in accord with the prevailing view that judges are state actors for purposes of the Eleventh Amendment and § 1983. *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1985); *McMillian*, *infra*; *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994); *Franceshi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995); *Greater Los Angeles Council On Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987); *O'Connor v. Nevada*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S. Ct. 491 (1982); *Holloway v. Walker*, *supra*; and *Giglio v. Supreme Court of Pennsylvania*, 675 F. Supp. 266 (M.D. Pa. 1987). Eleventh Amendment immunity attaches even though a judge may be acting in an administrative capacity. *Warnock v. Pecos County, Texas*, 88 F.3d 341 (5th Cir. 1996).

Mumford argues that the result below would have differed if the Sixth Circuit would have had the benefit of this Court's guidance in *McMillian v. Monroe County, Alabama*, __ U.S. __, 117 S. Ct. 1734 (1997), wherein this Court held that for Eleventh Amendment immunity purposes, an Alabama county sheriff was a "state" actor for purposes of § 1983. (Petition for Writ of Certiorari, pp. 24, 30). *McMillian* is factually distinguishable

because the "state" actor was a county sheriff, not a state common pleas court judge. *McMillian* is legally distinguishable because this Court interpreted the laws of the State of Alabama, not the laws of the State of Ohio.

Mumford's remaining argument that the Sixth Circuit's state actor conclusion conflicts with other circuits is of no consequence because to the extent that there may be a perceived conflict, this Court has observed that:

> . . . while it might be easier to decide cases arising under Section 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government; the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of counties and the nature of county government have varied historically from region to region, and from State to State.

McMillian, __ U.S. at __, 117 S. Ct. at 1741.

Although *Mumford II* antedated *McMillian v. Monroe County, Alabama*, the Sixth Circuit correctly determined that Ohio common pleas court judges are state actors for purposes of § 1983 liability and Eleventh Amendment immunity analyses. Accordingly, there is no reason to review the Sixth Circuit's finding of Eleventh Amendment immunity.

CONCLUSION

This Court's patronage dismissal law is not in need of further clarification or refinement. There are no conflicting circuit court decisions regarding the position of a domestic relations court referee. Since the Sixth Circuit properly determined that the First Amendment does not prohibit a patronage dismissal of a domestic relations court referee employed by a state common pleas court, and that the Eleventh Amendment bars an official capacity claim against an Ohio common pleas court judge, the Petition for [a] Writ of Certiorari should be denied.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio
M. ROBERT FLANAGAN*
Assistant County Prosecutor
Lorain County, Ohio
226 Middle Avenue
Third Floor
Elyria, Ohio 44035
(440) 329-5398

RICHARD O. WUERTH
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
(614) 228-6885

Attorneys for Respondent
Judge David A. Basinski

* *Counsel of Record*

APPENDIX A — MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED JULY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:96CV2182

Judge John M. Manos

DAVID M. MUMFORD,

Plaintiff,

v.

DAVID A. BASINSKI, et al.,

Defendant.

MEMORANDUM OF OPINION

On October 8, 1996, David M. Mumford, plaintiff, filed the above-captioned action against the Honorable David A. Basinski, Lorain County Common Pleas Court, in both his official and individual capacities, under 42 U.S.C. § 1983, alleging that defendant did not rehire him as a domestic relations court referee because of his political affiliation, which purportedly deprived him of his First Amendment rights. He seeks declaratory relief, reinstatement to his former position with back pay, and $2,000,000 in emotional distress and punitive damages. Jurisdiction is predicated upon 28 U.S.C. § 1331.

Appendix A

On November 18, 1996, defendant filed a motion for summary judgment. On December 17, 1996, plaintiff filed a response. For the following reasons, the motion for summary judgment is GRANTED.

I. FACTS

In 1989, the Honorable Joseph C. Zieba served as the Administrative Judge of the Lorain County Common Pleas Court, Domestic Relations Division. During this term, Zieba terminated plaintiff from his domestic relations referee position.

In 1990 and 1992, plaintiff sent three applications to defendant for reinstatement. He was not rehired. On April 4, 1994, he applied for a position with defendant, who was serving as the administrative judge of the domestic relation court at the time. On April 9, 1994, the court administrator advised plaintiff that he could not be considered for a position with the court due to its nepotism policies.[1]

In September 1994, defendant hired Michael Brosky to fill a newly created part-time referee position. Immediately after Brosky's appointment, plaintiff initiated this action.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

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1. At all relevant times, plaintiff's sister, Marilyn Jefferies, was employed by the domestic relations court as a Divorce Visitation/Mediation Investigator.

issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48

Appendix A

III. ANALYSIS

Plaintiff's claim is time-barred. He was notified in a letter dated April 9, 1994, that he would not be considered for a position with the domestic relations court. The Sixth Circuit has held that "the limitations period starts to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). Therefore the statute of limitations would have started to run in April 1994 and expired in April 1996.[2] This claim is time-barred since it was not filed until October 1996.

Even were the complaint timely filed, defendant is entitled to judgment as a matter of law. The Sixth Circuit has expressly stated that "an Ohio common pleas court is not a segment of a county government, but an arm of the state for purposes of § 1983 liability and Eleventh Amendment immunity analyses." *Mumford v. Basinski*, 105 F.3d 264, 269 (6th Cir. 1997). Therefore, the defendant is entitled to immunity and the claims against him in his official capacity cannot stand.

The *Mumford* court further held that the inherent duties of an Ohio domestic relations court referee are political in character and, therefore, "patronage considerations may justifiably influence or control the court's appointment to that post." *Id.* at 273. The First Amendment as a matter of law does not safeguard such referee positions from patronage considerations. *Id.*

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2. The Sixth Circuit has decided that the limitations period for § 1983 actions arising in Ohio is the two-year period found in Ohio Rev. Code § 2305.10. *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989).

Appendix A

Accordingly, defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

s/ John M. Manos
UNITED STATES DISTRICT JUDGE